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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

No. 77-347

OCTOBER TERM, 1977

CHARLES WALLACE NOLAN, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Charles Wallace Nolan, Jr., by his undersigned attorney, petitions this Honorable Court for issuance of a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the decision of that Court affirming petitioner's conviction and sentence for Unlawful Importation of Marijuana, rendered in the United States District

Court for the District of Kansas, sitting at Wichita, the Honorable Wesley Brown, Chief Judge, presiding.

In support hereof, your petitioner represents as follows:

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals sought to be reviewed is reported at 551 F.2d 266.

JURISDICTIONAL GROUNDS

(i) The judgment affirming the conviction was rendered March 22, 1977.

(ii) Petition for Re-hearing and suggestion for Re-hearing *En Banc* were denied July 7, 1977.

(iii) The statutory basis for jurisdiction is found at 28 U.S.C. §1254.

QUESTIONS FOR REVIEW

(i) Admissibility of prior unlawful acts during government's case-in-chief, under Federal Rules of evidence 404(b) and 403.

(ii) Propriety of receiving evidence and allowing argument during trial for Unlawful Importation of Marijuana, as to "street value" and anticipated profits upon ultimate

sale, where defendant's intent to distribute is neither charged nor proven.

RULES INVOLVED

(i) Rule 404(b):

> "Other crimes, wrongs, or acts. — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident."

(ii) Rule 403:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of accumulative evidence."

Both rules appear in Title 28, Appendix, United States Code, Federal Rules of Evidence.

STATEMENT OF FACTS

On July 3, 1975, Paul Edward Donagen shipped three (3) musical instruments from New Delhi, India, to the defendant in Emporia, Kansas. When the crate arrived at Wichita International Airport, a U. S. Custom's Agent ran a

computer check on the defendant/consignee's name, which revealed a 1973 conviction in Great Britain for an unspecified drug violation. This information prompted the custom's agent to make a careful inspection of the shipping crate, which resulted in the discovery of approximately eight (8) pounds of marijuana concealed in hollowed out portions of the wooden shipping crate. When the defendant arrived to pick up his package, he was arrested by the federal agents for Unlawful Importation of Marijuana in violation of 21 U.S.C. §952(a).

At trial, no evidence was offered that Nolan either shipped the crate himself, or caused the Paul Edward Donagen to ship it, or that there was any connection between them. At trial, the government offered the following evidence:

> 1. Testimony of the custom's agent that he ran the computer check, and that it revealed the English violation, to show justification for searching the packing crate.
>
> 2. Testimony of a British Customer's Agent that he had arrested Nolan in 1973 for attempting to import hashish into England, concealed in hollowed out wooden lamps, which Nolan had brought on a flight from New Delhi, India. The British Custom's Agent also stated that one quarter (¼) of *all* contraband which he discovers is found concealed in hollowed out wooden objects. The

> Custom's Agent was also permitted to testify, over Nolan's objection, concerning admissions made by Nolan in 1973 regarding the English violation, the filing of charges and the conviction (without supporting documentation), the content of the presentence investigation, and the remarks of the Trial Judge at the time of sentencing.
>
> 3. Testimony from an agent of the Drug Enforcement Administration as to the "street value" of the eight pounds of marijuana which Nolan was accused of importing.

Then, the government's attorney, in his summation, stated that:

> "The defendant knew exactly what he was doing and he hoped to profit by it, to-wit, under the testimony of Special Agent Jim Miller, who testified as to the value, the 'street value' of the marijuana, approximately $20.00 an ounce. There were approximately one hundred twenty ounces, $2,400.00 which is not too bad for a day's work.
>
> * * *
>
> The defendant got caught with his hand in the cookie jar and now he has to take his medicine. It's that simple."

On the basis of the foregoing remarks, the defendant moved for a mistrial, and his Motion was denied. The defendant was convicted, and sentenced to three (3) years

imprisonment, followed by a two (2) year probationary term.

BASIS FOR FEDERAL JURISDICTION

District Courts of the United States have original jurisdiction to adjudicate all offenses against the United States under Acts of Congress, pursuant to 18 U.S.C. §3231.

ARGUMENT FOR ALLOWANCE OF WRIT

This case is well suited to the considerations governing review on certiorari set forth under Rule 19 of the Rules of the United States Supreme Court, in the following particulars:

1. The decision of the Court of Appeals is in conflict with other decisions of Courts of Appeals in other Circuits.

2. The decision of the Tenth Circuit construes Rule 404(b) and 403 of the new Federal Rules of Evidence, neither of which have previously been construed by the U. S. Supreme Court.

3. The decision of the Court of Appeals constitutes a marked departure from the accepted and usual course of judicial proceedings, which have heretofore exhibited strong disfavor of using prior unlawful conduct to establish present guilt and this decision is in conflict with previous decisions of the U.S. Supreme Court on the same subject matter,

but which were rendered prior to the adoption of the Federal Rules of Evidence.

4. There exists an urgent need for the U. S. Supreme Court to establish clear and unambiguous criteria for the application of Rule 404(b) and; where evidence is deemed admissible thereunder, a subsequent reconsideration of the prejudicial impact of such evidence under Rule 403 should be mandated.

5. Confusion exists among the various Circuits, and guidelines must be established, as to what degree of *similarity* need be shown between the prior bad act and the offending act to render the evidence admissible under Rule 404(b).

Historically, attempts by prosecutors to inform a jury that an accused was guilty of prior unlawful acts, have met with intense judicial disfavor. An underlying concept of the Anglo-American system of criminal law is that an accused must be protected against forcible inculpation; either by his words or proof of his past misdeeds. The introduction of such evidence creates the obvious danger that the jury will punish the defendant for the offense because it believes him to be a person of bad character or because of the notion that since he committed some other similar crime, he must also have committed the crime for which he is now on trial. See *U.S. v. Goodwin*, 492 F.2d 1141, (5th Cir. 1974).

The majority decision of the Tenth Circuit Court of Appeals in *U.S. v. Burkhart*, 458 F.2d 201, (10th Cir. 1972),

recognized that, once a jury learns of a defendant's sordid past, the trial is for all practical purposes over, and the guilty verdict follows as a mere formality. (In *Burkhart, supra,* a strong dissent was offered by Circuit Judge Barrett. Judge Barrett, coincidentally, wrote the opinion below in the case at bar; which converts Judge Barrett's dissent in *Burkhart* to the law of the circuit.)

On July 1, 1975, fifteen days before Nolan was arrested, and but a few months before his trial began, the Federal Rules of Evidence (Public Law 93-595) became effective. Rule 404 excludes evidence of prior wrongs to impugn the character of the accused, but Rule 404(b) permits such evidence to show ". . . motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b) was merely a codification of long-standing common law governing the admissibility of such character evidence. Rule 403 embodies the common law "balancing test" under which the Trial Judge must weigh the potential for prejudice arising from the admission of such character evidence against its probative value in the trial.

When the government offered evidence of petitioner Nolan's prior unlawful conduct, the Trial Judge invoked Rule 404(b) to sanction its admissibility, with the mere comment that,

> ". . . it can be shown purely for the purpose of intent, design, a continuing course of conduct,

> guilty knowledge, mental disposition, a course of conduct, capacity, habit, plan, motive or identity."

It is the very manner in which Rule 404(b) was applied below which demonstrates the desirability and necessity of granting certiorari to review the merits of the Trial Judge's decision. Rule 404(b) was invoked without any supporting reasoning (and without any evidence that Rule 403 was considered) by the Trial Judge in the fashion of a magic incantation, the mere recital of which supposedly removed all barriers to the admissibility of the prejudicial evidence of prior unlawful acts, contrary to hundreds of years of Anglo-American policy strongly disfavoring proof of guilt by character assassination. As noted in *U. S. v. Taglione,* 546 F.2d 194 (5th Cir. 1977)

> "The various categories of exceptions [to Rule 404] are not magic passwords whose mere incantation will open wide the Courtroom doors to whatever evidence may be offered in their names."

Rule 404 is supposed to be a rule of *exclusion*. Exceptions to the rule of *exclusion* are found in Rule 404(b). In the case at bar, neither the government's attorney, the Trial Judge, nor the Tenth Circuit *ever* specified just which exception to the *exclusionary* provision of Rule 404 is, or was, established by the evidence of Nolan's prior unlawful conduct; or just *how* it establishes this fact. It is respectfully submitted that Rule 404 was *never* intended to be applied in

this fashion. In order for evidence of a prior bad act to be admissible, the government's attorney must be prepared to explain *precisely* how this evidence may tend to prove or disprove a proper consequential fact in the case. (See 2 Weinstein's Evidence, UNITED STATES RULES, pg. 404-42). If Judges and prosecutors can justify the admissibility of prior unlawful acts by merely restating the language of Rule 404(b) in its entirety, the extreme caution and disfavor with which such evidence has always been regarded will be a thing of the past, and the admissibility of such evidence will become the rule, rather than the exception. Exactly such a fear was recognized in *U.S. v. Cook*, 538 F.2d 1000, (3rd Cir. 1976).

Furthermore, there are no criteria set forth under Rule 404 to help guide a Trial Judge in implementing the provision of the rule. Some guidelines need to be set forth to establish the degree of similarity (and allowable remoteness) between the offending act and the prior bad act to render the evidence admissible under Rule 404. The confusion and conflict which exists among the circuits in the application of Rule 404 may be demonstrated by the following excerpts from various cases decided after the implementation of the Federal Rules of Evidence:

[1] *U. S. v. Scholle*, 553 F.2d 1109 (8th Cir. 1977)

The defendant was on trial for the importation of *cocaine*. A witness for the prosecution was

allowed to testify, under Rule 404, as to a particular transaction occurring *two years* earlier when the defendant had loaned money to the witness to buy some *marijuana*. The Trial Judge apparently felt that two years was not too remote and that the two acts by the defendant were similar enough to invoke Rule 404 to justify its admission. The conviction was affirmed by the 8th Circuit.

[2] *U. S. v. James*, 555 F.2d 992 (D.C.C.A. 1977)

In *James*, the two related acts of the defendant were but sixteen days apart and both were drug offenses involving heroine. Although a high degree of similarity was found by the Court of Appeals, that evidence concerning the prior bad act was held inadmissible on appeal because it failed to prove any issue in the trial. The Court clearly indicated that it would weigh the probative value of the evidence against its inherent prejudice.

[3] *U. S. v. Bloom*, 538 F.2d 704 (5th Cir. 1976)

The defendant in *Bloom*, was tried for the possession of heroine. Extrinsic evidence of the defendant's prior dealings with cocaine and marijuana was held admissible as *similar* offenses. The Court stated that the defendant's willingness to deal in a variety of controlled substances had a direct bearing on his mens rea with respect to possessing heroine.

[4] *U. S. v. Park*, 525 F.2d 1279 (5th Cir. 1976)

In *Park*, the defendant was charged with knowingly receiving a stolen *T.V. set*. The Court of Appeals held that it was error for the Trial Court

to allow cross-examination of a defense witness insinuating improper conduct of the defendant concerning *air conditioners*. Citing Rule 404(b), the exception does not apply unless there is "such a exception does not apply unless there is "such a high degree of similarity (between crimes) as to mark it as the handiwork of the accused."

[5] *U. S. v. Marshall*, 526 F.2d 1349 (9th Cir. 1976)

In the prosecution for possession and distribution of *heroine*, evidence of the defendant's prior possession of *cocaine* was held admissible under Rule 404, to establish knowledge, intent, and motive on the defendant's behalf.

[6] *U. S. v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974)

The defendant was on trial for conspiracy to import and importing *marijuana*. The Court of Appeals held inadmissible, evidence of apprehension of the defendant while bringing *marijuana* into the United States only *nine months* after the crime with which he was charged. The same drug, marijuana was involved in that case; the same mode of operation, importation was the same; and the time span between the two offenses was only nine months. Yet, the evidence was held inadmissible.

[7] *U. S. v. Ziedman*, 540 F.2d 314 (7th Cir. 1976)

The 7th Circuit held that a *five year* time span between related offenses establishing a course of conduct was not too remote to prevent admissibility under Rule 404.

[8] *U. S. v. Myers*, 550 F.2d 1036 (5th Cir. 1977)

In *Myers*, the government attempted to introduce evidence of a previous Pennsylvania Bank robbery to prove that the defendant had committed a Florida Bank robbery because it exhibited characteristic "modus operandi". The government offered ten separate indicia of similarity between the two bank robberies arguing that these ten common features gave the evidence of the other crime sufficient probative value to outweigh the prejudice to the defendant. (at page 1046). The Court of Appeals held these common features insufficient under Rule 440 to justify their admission. The Court in its opinion (at 1045) stated that the two crimes "must possess a common feature or features that make it very likely that the unknown perpetrator of the charged crime and the known perpetrator of the uncharged crime are the same person. The more unique each of the common features is, the smaller the number that is required for the probative value of the evidence to become significant."

Not only was Rule 404(b) improperly applied below; there is no evidence that the judicial function contemplated by Rule 403 was ever performed. Assuming that the Trial Court had considered Rule 404(b) applicable, and had determined that Nolan's prior unlawful conduct in Great Britain fell within one of these specific exceptions listed in Rule 404(b), Rule 403 then contemplates a balancing between whatever probative value the prior conduct might have, and the obvious prejudicial impact it would have on

the jury. Rule 404 provides only that evidence *may* be admissible. The Advisory Committees' Notes on Rule 404 state that:

> "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403(a)."

The Trial Judge never even considered Rule 403, and, consequently, no balancing of these two conflicting factors ever took place at trial. Although such balancing is in the Trial Court's discretion, such discretion *must* coincide with consideration of Rule 403. Rule 403 recognizes that relevancy is not always enough. The question remains as to whether the value of the evidence is worth what it costs in light of the prejudice to the defendant. The Trial Court *must* assess the probative value of the preferred evidence as well as the harmful consequences specified in Rule 403 that might arise from its admission. It is without question that evidence which appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on prejudice rather than those propositions established by relevant evidence in the caes in chief. (See 1 Weinstein's Evidence, UNITED STATES RULES, pg. 403-16).

To prevent such "trials by prejudice", the applicability of Rule 403 must be considered by the Trial Court. The Trial Court's discretion in these matters is subject to reversal where this discretion has been abused. The petitioner contends that this discretion has been abused, where, as in the case at bar, the Trial Court abdicated his judicial responsibility by refusing to consider Rule 403.

The petitioner submits, therefore, that certiorari should be granted in this case for the specific purpose of establishing criteria to be employed in all federal courts where the prosecution seeks to admit evidence of an accused's prior unlawful conduct under Rule 404; where the accused has not placed his character in issue by taking the witness stand.

The petitioner proposes the following criteria:

1. Selection of a Specific Exception.

   Rather than merely reciting Rule 404(b) verbatim, the prosecution should be required to specify which stated exception under Rule 404(b) is to be established by the evidence of the prior unlawful act.

2. Probative Value.

   After the applicable exception has been specified, the prosecution should then be required to show just *how* the evidence of the accused's previous conduct establishes the particular specified exception. If the unlawful evidence merely shows the

accused to be a person disposed to commit the type of offense for which he has been charged, because he did something similar in the past, the evidence should be rejected.

3. Balancing Prejudice and Probative Value.

If, under a proper application of the two foregoing criteria, it is determined that the evidence in question is admissible, under Rule 404, it should still not be admitted unless the probative value of the evidence is weighed against the prejudicial impact of the same. If the evidence is ultimately admitted, as noted in *Burkhart*, supra, the accused will undoubtedly be convicted. Accordingly, the prior unlawful conduct must be so intimately tied to the offense charged that the two are virtually inseparable, and proof of the former literally establishes the latter.

Petitioner, Nolan, respectfully submits that, if the foregoing criteria were adopted by this Honorable Court, the shot-gun admissibility of prior unlawful conduct such as occurred below, would be effectively precluded, and a more careful analysis of the proferred evidence would be required. When prior bad act evidence reaches the attention of the jury, it is most difficult, if not impossible, to assume the continued integrity of the presumption of innocence. Guilt or innocence as to a particular crime should be determined solely on the basis of evidence relevant to *that* crime. The

various federal courts need to be reminded of the historic disapproval of such character evidence in the common law. Such disapproval was well-founded. Rule 404 must not be allowed to be used to introduce highly prejudicial evidence by merely quoting the language of the Rule verbatim as was done in the case at bar. The Trial Court must balance what is *proven* by such evidence against what might be improperly *inferred* from such evidence. A defendant in the Anglo-American system of justice must not be found guilty by a jury on the basis of improper inferences drawn from improperly admitted evidence. As shown above, this is exactly what is occurring under the new standards being set forth by the various circuits under Rule 404.

The petitioner also seeks certiorari for a different, but related reason. Nolan's jury was not merely given a brief exposure to his prior record; rather, the jurors were given ten times the lethal dosage. First, the jury learned of Nolan's record through the testimony of the custom's agent, who related that the computer check he ran on Nolan revealed his English conviction. The ostensible justification for this testimony was to show *why* the search of the packing crate which lead to the discovery of the contraband was made. It was argued unsuccessfully to the Trial Judge, and to the Tenth Circuit, that *why a* search was made is not a proper subject for the jury's consideration, particularly in light of

the prejudicial effect such evidence has on the defendant. By analogy, this evidence is no more proper for the jury to receive than an affidavit for a seach warrant would be. Once the contraband is discovered, *why* the search was initially made is immaterial and inadmissible.

Next, this evidence was underscored for the jury by the testimony of the British custom's agent who initially apprehended Nolan. The agent, however, did not merely recite that Nolan was apprehended attempting to interdict contraband into England, but the agent, over the defendant's objection, was permitted to testify as to his in-custodial interrogation of Nolan, the admissions procured thereby, the charges ultimately brought against Nolan, the judicial proceedings which followed, the content of the pre-sentence investigation, and even the remarks of the British Judge at the time of sentencing!

Finally, the *coup de grace* was administered to Nolan by the admission, over Nolan's objection, of testimony as to the "street value" of the marijuana, assuming that it had been broken down into ounces and then sold on the street for $20.00 an ounce. That Nolan had such an intention is purely speculative, for the record reveals no evidence to support any charge that Nolan intended to distribute the marijuana. Finally, on closing argument, the prosecutor

stated that Nolan would receive $2,400.00 in profit when he sold it on the street, which the government stated was

". . . not too bad for a day's work."

It was in this fashion that a whole new type of unlawful conduct other than charged in the indictment was introduced to the jury. Nolan was charged with the unlawful importation of marijuana; then he was portrayed to the jury as being just another "dope pusher." The prejudice conjured up in the jury's minds by the stereotype image of a drug dealer is impossible to portray in mere words, for it is the most depised stereotype image in contemporary American society. The mere mention of a "dope pusher" immediately produces images of a sallow-faced Mafioso lurking around playgrounds attempting to get five year old children hooked on heroin. A juror who was then lead to believe that a defendant is one of these "dope pushers" would be somewhat reluctant to return a verdict of "innocent".[1] The petitioner draws little comfort from the Tenth Circuit's acknowledgment that the closing argument was improper, for it was held to be "harmless error."

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[1]The jury was instructed by the Trial Court that it could find the defendant "guilty" or "innocent," rather than the usual standards of "guilty" or "not guilty." Although the petitioner may not have been proven guilty beyond a reasonable doubt in this case, even he acknowledges that it would be difficult for a jury to find him "innocent." This instruction was approved by the Tenth Circuit in its opinion below.

To summarize, the petitioner submits that certiorari should be granted in this case to establish criteria for the implementation of Rules 403 and 404(b), which would preclude a haphazard invocation of these Rules to admit evidence of prior unlawful conduct and the effortless fashion with which it was admitted below. Further, the petitioner seeks certiorari to review the propriety, while on trial for the importation of marijuana, of his being subjected to the above mentioned "dope pusher" stereotype resulting from the prosecutor's closing argument.

COPIES OF THE OPINION BELOW, AND THE ORDER DENYING THE PETITION FOR RE-HEARING ARE SUBMITTED UNDER SEPARATE COVER

WHEREFORE, Charles Wallace Nolan, Jr. respectfully petitions this Honorable Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit rendered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Rabon Martin, certify that on the 2nd day of September, 1977, I mailed a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, with sufficient postage prepaid thereon to entitle same to due passage in the United States mail.

C. Rabon Martin